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MEMORANDUM: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
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SUBJECT: Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2004-2005 administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (hot-rolled steel) from the Netherlands. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Simplified Reporting and Further-Manufactured Imports
2. G&A expenses
3. Constructed Export Price (CEP) Profit Rate
4. Offsetting Dumped Sales with Non-Dumped Sales
5. Classification of JIT Deliveries as CEP Sales
6. Duty Absorption
7. Warranty Expenses
8. Clerical Errors

Background

On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 71523 (December 11, 2006) (Preliminary Results). The period of review (POR) is November 1, 2004, through October 31, 2005.

This review covers sales of certain hot-rolled steel made by one manufacturer/exporter, Corus Staal BV (Corus). We invited parties to comment on our preliminary results. We received case briefs from Corus and domestic interested party Mittal Steel USA Inc. (Mittal Steel) on January 17, 2007. On January 24, 2004, we received rebuttal briefs from Corus, Mittal Steel and petitioner United States Steel Corporation (U.S. Steel). On January 25, 2007, domestic interested party Nucor Corporation (Nucor) filed a rebuttal brief.

Discussion of the Issues

1. Simplified Reporting and Further-Manufactured Imports

Mittal Steel renews its objections to the Department's use of "simplified reporting" for Corus' imports that were further manufactured by affiliates. According to Mittal Steel, once the Department has determined the value added in the United States to imports of subject merchandise is likely to exceed substantially the value of those imports, the Department's subsequent decision to use identical or similar subject merchandise to calculate a margin for the further-manufactured imports is dependent upon two factors. Mittal Steel states those two factors are (1) whether there is a sufficient quantity of sales to provide a reasonable basis for comparison and (2) whether it is appropriate to use such sales, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews (TRBs from Japan), 63 FR 2558, 2561. Further citing TRBs from Japan, Mittal Steel claims the Department also must examine whether the use of any proxy produces accurate results.

Mittal Steel states that prior to the preliminary results of this review, it urged the Department to collect additional data on Corus' further-manufactured U.S. imports and to base the dumping margin on those data. Mittal Steel asserts the preliminary results confirm the need for the Department to obtain additional data, and that the Department is legally required to do so in order to calculate the most accurate margin possible.

Mittal Steel states it used information on the record to create a U.S. sales database of further-manufactured products and then used this database to estimate a margin for Corus' further-manufactured imports. Specifically, Mittal Steel contends that it used the information regarding Corus' further-manufactured imports in Exhibit A-30 of Corus' April 28, 2006, supplemental questionnaire response (SQR) to determine the product code, physical characteristics, quantity, gross unit price, and entered value of the further-manufactured imports. See Mittal Steel Case Brief at 4. Mittal Steel also describes how it used other information on the record to derive an amount for certain adjustments to U.S. price and to set the values for other fields. Id. at 4-5. To determine the cost of further manufacturing, Mittal Steel states it subtracted the cost of the imported inputs from the sales price of the finished products in Exhibit A-30 of Corus' April 28, 2006, SQR, divided this amount by the finished product quantity sold in Exhibit A-30, and then multiplied the result by 0.80. Mittal Steel claims that this calculation results in a conservative

estimate of further manufacturing costs when one considers the total sales value of further manufactured goods reported in Exhibit A-30 and certain information in the financial statements of Thomas Steel Strip (Thomas) and Hille and Mueller U.S.A. (Corus' further-manufacturing subsidiaries). Mittal Steel states it then ran a modified version of the Department's margin program using its created database of U.S. further manufactured sales and its computed further manufacturing costs, which resulted in a significant dumping margin for Corus' further-manufactured exports.

Mittal Steel argues that another approach for determining margins for further-manufactured imports under the special rule is identified in the Statement of Administrative Action, Uruguay Round Agreements Act, H.Doc 316, Vol. 1, 103d Cong. 2d Sess. 656 (1994) (SAA). Mittal Steel holds the Department may calculate constructed export price (CEP) "'based on the price paid to the exporter or producer by the affiliated person for the subject merchandise, if Commerce determines that such a price is appropriate.'" See Mittal Steel's Case Brief at 8, quoting the SAA at 826. Citing Antidumping Duties; Countervailing Duties; Final Rule (Final Rule), 62 FR 27295, 27353 (May 19, 1997), Mittal Steel claims "the Department noted it was reasonable to rely on transfer prices to determine the applicability of the special rule because of the possible use of transfer prices to determine a margin" for further-manufactured sales. See Mittal Steel Case Brief at 8 (emphasis Mittal Steel). To implement this approach, Mittal Steel states it took the U.S. sales database it created, changed the sales type (SALEU) from CEP to export price (EP), and set gross unit price (GRSUPRU) equal to the price of the further-manufactured imports, i.e., the transfer prices from Corus to its affiliated importer.

Mittal Steel contends the results of both of these analyses demonstrate that the Department should collect additional data on Corus' further-manufactured imports and calculate a margin using those data. Mittal Steel asserts that the statute allows the Department to calculate a margin for further-manufactured imports using a surrogate only if it is appropriate to do so, and citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990), argues the statute requires the Department to calculate margins as accurately as possible. Therefore, Mittal Steel contends, the Department must consider this in deciding whether it is appropriate to use the margin calculated for non-further-manufactured sales as a proxy for further-manufactured imports.

Corus responds that Mittal Steel essentially is asking the Department to depart from its regulations by requiring Corus to provide full reporting of its sales of further-manufactured imports in order to justify the use of simplified reporting. Corus refers to the Department's June 15, 2006, "Memorandum Regarding Simplified Reporting and Value Added in the United States by Thomas Steel" (Value Added Memorandum) at 4 in which the Department preliminarily found the value added in the United States was likely to exceed substantially the value of the imported subject merchandise. The Department also concluded there was a sufficient quantity of sales to provide a reasonable basis for comparison under section 772(e) of the Tariff Act of 1930, as amended (the Tariff Act), and preliminarily found Corus' simplified reporting of sales to Thomas to be appropriate. Corus claims the Department properly concluded that Corus met the statutory criteria, and asserts Mittal Steel does not contest the Department's finding that Corus

met these statutory criteria. According to Corus, Mittal Steel's only argument is that there is a statutory requirement that the margin selected as a proxy produce the most accurate results. Corus further asserts that Mittal Steel construes this requirement as meaning "'the Department cannot employ the margin determined for other imports if it knows or has reasonable grounds to believe that the use of such margin will not produce the most accurate results possible.'" See Corus Rebuttal Brief at 4, quoting Mittal Steel Case Brief at 3. Corus contends Mittal Steel's statement is unsupported by the statute or the regulations and cites the Final Rule at 27354, in which the Department stated the burden of performing value-added calculations far outweighed any increase in accuracy achieved by such calculations.

Corus asserts Mittal Steel's arguments amount to nothing more than margin shopping. Referring to Mittal Steel's letters of March 22, 2006, at 6, May 12, 2006, at Exhibit 1, and May 15, 2006, at Exhibits 2 and 3 and Mittal Steel's Case Brief at 7 and 9, Corus lists the margins Mittal Steel has calculated throughout this proceeding and claims these margins show the inaccuracies of Mittal Steel's methodologies. According to Corus, these margins illustrate "the fragility of such calculations and their absolute dependence on the assumptions and speculations made in deriving the result." See Corus Rebuttal Brief at 5. Corus claims the arguments raised in Mittal Steel's case brief are no more valid than those in Mittal Steel's earlier submissions, and argues the margin calculation methodology used in Mittal Steel's case brief was similar to the approach used in Mittal Steel's earlier submissions that resulted in margins varying by nearly 100 percentage points. Corus argues using the Department's programs and some of Corus' data coupled with numerous assumptions to calculate margins does not render the resulting margins legitimate and accurate.

Corus contends that accurately backing out further-manufacturing costs from the finished product would be very complex, a burden to the Department, and create less accurate results. Corus argues the instant case differs from TRBs from Japan, because the further-manufactured material in the instant case is not of the same class or kind of merchandise as the subject merchandise and the Department has never computed margins for further-processed material in prior reviews of hot-rolled steel from the Netherlands. Corus asserts the further-processed material in this case consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. Corus argues reporting and analyzing these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting. Corus argues the acceptance of Mittal Steel's suggestion for full reporting "could open the floodgates in a manner that would negate the the statutory provision for simplified reporting." See Corus Rebuttal Brief at 7. Therefore, Corus urges the Department to accept Corus' reporting of Thomas's further-manufactured sales using the simplified reporting methodology.

Department's Position:
The "special rule" for merchandise with value added after importation is defined by section 772(e) the Act as:

> Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated

> person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison, and the administering authority determines that the use of such sales is appropriate:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> If there is not sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) and (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

Also, 19 CFR 351.402(c)(2) defines "exceed substantially" as meaning the value added in the United States is at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States.

In this case, Corus has demonstrated, and petitioner has not questioned, that the sales in question meet the statutory and regulatory provisions governing the "special rule." Thus, the Department is satisfied the value added is at least 65 percent of the imported subject merchandise and that there is a sufficient quantity of sales to provide a reasonable basis for comparison. We find Mittal's suggestion that we should use transfer prices to be moot, as we have determined the sales to be representative and the value added to be sufficient.

The Department agrees that in this case the further-manufactured material is not of the same class or kind of merchandise as the subject merchandise as it consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. However, the Department disagrees with Corus's assertion that reporting these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting.

The intent of the special rule is to ease the administrative burden for the Department, as the SAA clearly indicates. Moreover, the SAA makes clear that the intent behind the special rule is that "Commerce not be required to perform a precise calculation of the value added. Requiring such a precise calculation would defeat the purpose of the new rule of saving Commerce the considerable effort of measuring precisely the U.S. value added."

Thus, for the reasons outlined in the Value Added Memorandum, and for the reasons outlined above, the Department has not changed its position with respect to these further manufactured imports.

2: General and Administrative (G&A) Expenses

Mittal Steel claims that Corus underreported its G&A expenses through its calculation methodology. Citing Corus' September 8, 2006, SQR at 6-7, Mittal Steel claims Corus shows how its reported G&A expenses approximate the G&A expenses apportioned to its production lines through the budgeting process. Mittal Steel states respondent's calculation goes against the Department's practice of using company-wide G&A expenses to compute a G&A expense rate. Mittal Steel argues that Corus should have reconciled its reported G&A expenses to the total overall G&A expenses for Corus' hot-rolled steel producing entities. Mittal Steel argues those overall G&A expenses should be used to compute its G&A expense rate. However, Mittal Steel suggests that alternatively, the Department could use Corus's total other operating costs from its financial statements to represent Corus' total G&A expenses in the G&A expense ratio calculation.

Corus disagrees with Mittal Steel's allegations. First, respondent contends that Mittal Steel has inappropriately compared two disparate sets of figures: an "other operating cost" expense ratio, from Corus' financial statements, and the reported G&A expenses for entities producing hot-rolled steel. Corus argues this comparison is totally without merit because other operating costs do not equate to G&A expenses.

Second, Corus refutes Mittal Steel's allegation that it has understated its G&A expenses by deviating from the Department's normal G&A expense rate calculation methodology. Corus asserts it appropriately computed its G&A expense rate and that it allocated G&A expenses to subject merchandise based on the company's total cost of goods sold for companies producing hot-rolled steel, including Corus Staal BV (i.e., the respondent company), CNBV, and the headquarter's expenses incurred by Corus Group (i.e., overall parent company). Corus contends this methodology has been fully verified in past proceedings and, aside from an overstatement of G&A expenses on respondent's own part, the methodology has not been adjusted by the Department in the past. For these reasons, Corus insists the Department should continue to accept its reported costs, including the G&A expenses.

Department's Position:

In the instant case, Corus reported G&A expenses inclusive of its own administrative costs and portions of the administrative costs of its parent companies, CNBV and Corus Group. With regard to the specific amounts, Corus provided detailed supporting documents to explain the amounts included in its total G&A expense figure. For example, the amount of Corus Group's total G&A expenses to be allocated over its cost of goods sold was presented in a worksheet that detailed Corus Group's total operating costs by type of cost, which were reconciled to the financial statements. In that schedule, Corus showed line by line which costs were G&A expenses. Using that total G&A expense figure, Corus computed the amount that should be included in its reported G&A expenses. Accordingly, we are accepting Corus' calculated G&A expense rate based on its unconsolidated financial statements, including an allocated portion of its parent companies' G&A expenses, for the final results. See, e.g., Final Determination in the Antidumping Investigation of Light-Walled Rectangular Pipe and Tube from Mexico , 69 FR 53677 (September 2, 2004) and accompanying Issues and Decision Memorandum at Comment

25, where the Department described its practice of calculating a respondent company's G&A expense rate based on the respondent company's unconsolidated financial statements, while also including a portion of the parent company's G&A expenses.

3: Constructed Export Price (CEP) Profit Rate

Referring to section 772(f)(2)(C) of the Tariff Act and "Calculation of Profit for Constructed Export Price Transactions," Import Administration Policy Bulletin No. 97/1 (September 4, 1997) (Policy Bulletin 97/1), Mittal Steel notes the Department typically calculates the CEP profit rate based on the reported expenses where such data is available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). Comparing the CEP profit rate calculated in the preliminary results to the profit rates derived from the income statements of Corus Staal BV and Corus Strip Products IJmuiden (CSPY), Mittal Steel claims the accuracy of Corus' reported expenses in the instant review is questionable.[1]

In relation to Mittal Steel's argument regarding Corus' CEP profit, petitioner suggests Corus' overall cost reporting appears to understate the expenses associated with its sales of hot-rolled steel in the period of review.

Corus maintains it reported its cost data in this review using the same methodologies verified in the investigation and first review and has responded to numerous supplemental questionnaires that establish the validity of its reported cost information.

Corus also asserts Mittal Steel cannot question the accuracy of its cost data based on a comparison of profit percentages that are different in nature. First, Corus argues, the Department's CEP profit calculation is based on methodologies that do not relate to how average profitability is calculated in the normal course of business. For example, Corus states, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by Corus's affiliates, whose results are not captured in the CSPY income statement. Corus contends the differences between the artificial CEP profit and actual profit ratios do not render Corus' reported costs inaccurate, but rather show one of the biases built into the Department's standard margin calculation methodology that results in inflated margins. Second, Corus claims, as shown in its sales reconciliation and in Mittal Steel's case brief at 11, the CEP profit rate is based on a subset of CSPY's total sales which is not necessarily representative of the whole. Corus argues that not only is this subset a minor portion of CSPY's total sales, but the U.S. portion of these sales, which are all of prime material, are being made at high prices. Corus maintains U.S. price levels are so high that even with "zeroing" the Department computed a preliminary margin of only 2.52 percent. Therefore, Corus contends the

[1] In making this comparison, Mittal Steel relies on business proprietary information that is not susceptible to public summary.

fact that the CEP profit rate is greater than CSPY's average profitability across all products and markets does not make Corus' cost reporting questionable. Corus argues this conclusion is more compelling if Corus Staal's profit rate is used as the point of comparison, since total Corus Staal sales revenue is higher than CSPY's and comes from a wider product range. Similarly, Corus maintains, since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP Profit ratio to be representative of total average profitability.

Department's position:

We agree with Corus. Corus has submitted extensive cost responses covering for example, differences in costs of similar products, explanations of the Corus standard cost system. We obtained cost buildups for selected CONNUMs and reviewed the CONNUM buildups to ensure all appropriate costs (i.e., all the elements of COP) were included. From reviewing these numerous responses, we have determined that Corus reported actual weighted-average POR product-specific costs. As to petitioner's argument regarding the difference in profit rates, we do not believe that comparing profit rates is meaningful because product-specific rates will differ from average rates, which include a multitude of products. Therefore, petitioner's finding of a difference in profit rates is neither unusual nor meaningful.

With respect to the comments on the CEP profit calculation, the Department notes, as does Corus, the CEP profit rate calculated in the preliminary results cannot be compared to the profit rates derived from the income statements of Corus Staal BV and CSPY. For example, as Corus indicates, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by CSBV's affiliates, whose results are not captured in the CSPY income statement. The CEP profit calculation used by the Department is a standard calculation and relies on the cost of production data and sales data submitted by Corus. The Department agrees that since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP profit ratio to be representative of total average profitability.

Moreover, as Mittal Steel itself referenced in its brief, the Department typically calculates the CEP profit rate based on the reported expenses where such data are available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). However, in this case the data were available from the submitted responses. Thus, we have made no changes with respect to the CEP profit calculation.

4. Offsetting Dumped Sales with Non-Dumped Sales

Corus claims the Department acted contrary to the statute by using the "zeroing" methodology in the preliminary results. Corus states the Department compared the price of individual U.S. transactions with the monthly weighted-average NV and when U.S. price was greater than NV,

the Department set the resulting negative margin equal to zero for purposes of computing the overall weighted-average dumping margin. Corus contends sales with negative margins were not given their full mathematical effect in the calculation of the overall weighted-average dumping margin and therefore the Department's methodology resulted in a substantially higher dumping margin, cash deposit rate and assessment rate.

According to Corus, both the Court of International Trade (IT) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) have found the statute does not require zeroing in either investigations or administrative reviews, citing Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1261 (Ct. Int'l Trade 2003), aff'd, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006) (Corus I) and Timken Company v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004), cert. denied, Koyo Seiko Co., Ltd. v. United States., 125 S. Ct. 412 (Nov. 1, 2004) (Timken), respectively. Further, Corus argues, the CIT has acknowledged that zeroing introduces a statistical bias into the antidumping calculation, citing Corus I, 259 F. Supp. 2d at 1263. Despite this, Corus contends the Department has continued to maintain that the statute allows zeroing in administrative reviews, and the courts have found zeroing to be a valid interpretation of the statute. Corus Case Brief at 5, citing Timken, 354 F.3d at 1342-43; Corus I, 259 F. Supp 2d at 1264-65; Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1300 (July 19, 2005), aff'd 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006) (Corus II); and Corus Staal BV v. United States, 2006 Ct. Int'l Trade LEXIS 113 at * 8-9 (CIT July 25, 2006) (Corus III).

Corus asserts the Department should find that the statute permits, and U.S. obligations under the WTO Agreement on Antidumping (Antidumping Agreement) require, a different interpretation with respect to zeroing in administrative reviews. Corus argues both the Federal Circuit and the WTO have found the differences between administrative reviews and investigations are irrelevant with respect to zeroing. Corus Case Brief at 5, citing Corus I, at 1347 and United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R at ¶ 135 (WTO App. Body Dec. 15, 2003) (Corrosion-Resistant). Referring to United States -- Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/18, Communication by the United States at ¶ 12 (June 12, 2006), Corus maintains the U.S. Government has reasoned the prohibitions against zeroing are equally applicable to administrative reviews and investigations.

Corus asserts the WTO first found zeroing to be inconsistent with the terms of the Antidumping Agreement in European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS141/AB/R (WTO App. Body Mar. 1, 2001) (Bed Linen) and later in other determinations involving the United States. More recently, Corus contends the WTO Dispute Settlement Body (DSB) specifically determined in United States – Laws, Regulations and Methodology for Calculating Dumping Margins WT/DS294/R (Panel Rep't Oct. 31, 2005) (Panel Report) that (1) the Department had violated Article 2.4.2 of the Antidumping Agreement in using its zeroing methodology in the U.S. antidumping investigation of, inter alia, hot-rolled steel from the Netherlands and (2) the Department's zeroing methodology is a norm which, as such, is inconsistent with Article 2.4.2 of the Antidumping Agreement. Corus Case Brief at 7,

citing the Panel Report at ¶¶ 7.32, 7.105 and 7.106.

Subsequent to the Panel Report, Corus maintains the United States announced a change with regard to its zeroing policy and solicited comments as to the appropriate methodology to use in antidumping investigations. Corus Case Brief at 7-8, citing Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006). Corus argues the WTO Appellate Body then found zeroing was not permissible in an average-to-average comparison methodology in investigations. Corus claims the Appellate Body's decision was not limited to investigations, and states the Appellate Body was unequivocal with respect to the impermissibility of zeroing in the antidumping administrative reviews at issue therein. Corus Case Brief at 8, citing United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (App. Body Rep't Apr. 18, 2006) (Appellate Body Report) at ¶ 263.

Corus states the DSB adopted the Panel Report as modified by the Appellate Body Report (collectively, WTO Final Report on Zeroing) on May 9, 2006. Corus holds the United States subsequently entered into an agreement to implement the WTO Final Report on Zeroing findings by April 9, 2007, citing United States -- Laws, Regulations and Methodology for Calculating Dumping Margins, Agreement under Article 21.3(b) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS294/19 (Aug. 1, 2006).

Citing Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 FR 1704 (January 16, 2007), Corus asserts that effective January 23, 2007, the Department abandoned the use of zeroing in the context of average-to-average comparisons in investigations. Corus asserts that implementation of the WTO's determination as to the antidumping investigation underlying the order on hot-rolled steel from the Netherlands will result in a negative dumping margin being calculated and the order being revoked. Moreover, Corus contends the same logic relied upon by the Appellate Body to prohibit the use of zeroing in investigations can be applied to administrative reviews. According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an 'as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at ¶¶ 137, 156, 165 and 185 (Jan. 9, 2007) (United States – Zeroing (2007)).

Based on the foregoing, Corus argues the Department's use of zeroing is unreasonable under U.S. law. Accordingly, Corus urges the Department to modify its practice to eliminate zeroing for these final results.

U.S. Steel responds that contrary to Corus' claim, zeroing is required by the statute while Mittal Steel and Nucor contend that Corus' approach is unreasonable under U.S. law. Both U.S. Steel and Nucor argue that section 777A(d) of the Act sets forth the methodology to be used in calculating dumping margins. U.S. Steel and Nucor hold that in investigations without targeted dumping, the Department is instructed to use the average-to-average comparison methodology, whereas in investigations with targeted dumping and in administrative reviews, the Department is to use the average-to-transaction comparison methodology. U.S. Steel and Nucor assert that if zeroing is not used, a respondent's dumping margin will always be the same regardless of which methodology is employed, because without zeroing all positive margins are offset by all negative margins under both methodologies. U.S. Steel and Nucor maintain this principle has been acknowledged by the U.S. Government and several WTO Panels, citing, inter alia, Opening Statement of the United States at the First Substantive Meeting of the Panel in United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (Mar. 16, 2005) (United States – Zeroing (2006)) at 5, ¶ 13 and the Panel Report at 142, ¶ 7.266. U.S. Steel and Nucor claim it would have been pointless for Congress to amend the statute in 1995 to require a specific comparison methodology for each of these three scenarios if both the average-to-average and average-to-transaction comparison methodologies yielded the same result. Citing various Federal Circuit and Supreme Court decisions, U.S. Steel and Nucor argue that the rules of statutory construction require a statute to be interpreted in a manner that prevents any provision of that statute from being rendered meaningless. Therefore, U.S. Steel and Nucor contend, the statute must be construed to give effect to the different methodologies set forth in section 777A(d) of the Act, and the only way to do so is to use zeroing.

Even if zeroing were not required by the statute, U.S. Steel contends, it is definitely a reasonable interpretation of the statute. U.S. Steel and Nucor assert that every U.S. court that has examined this issue has upheld the Department's use of zeroing as a reasonable and allowable interpretation of the statute, citing, inter alia, Corus I at 1347-49; Timken, at 1334, 1342-43, 1345; Corus II; and Corus III. U.S. Steel maintains the Federal Circuit has found zeroing to be in accordance with the statute in both investigations and administrative reviews, citing Corus I and Timken. U.S. Steel and Nucor claim the Federal Circuit found that WTO decisions are not binding on the United States and cannot override U.S. law, citing Corus I, at 1347-49 and Corus III. U.S. Steel states the Federal Circuit's ruling in Corus I is equally applicable to United States – Zeroing (2007). Nucor argues that Corus does not provide any arguments or information in its case brief that prescribe a different outcome from that reached in every previous instance by the Department and the courts.

U.S. Steel argues that even if the Department had the legal authority to abandon zeroing based on the WTO's decisions, the implementation process is not relevant here. U.S. Steel holds that in United States – Zeroing (2006), the WTO Appellate Body determined that zeroing was inconsistent with the Antidumping Agreement in the context of the 16 administrative reviews challenged by the European Commission, but did not find that zeroing was inconsistent with the Antidumping Agreement "as such" in all administrative reviews. Therefore, U.S. Steel claims, United States – Zeroing (2006) cannot possibly have any bearing on the instant review.

U.S. Steel, Mittal Steel, and Nucor state that under sections 123 and 129 of the Uruguay Round Agreements Act (URAA), the Department must implement any WTO decisions in accordance with the statutory requirements for implementation, which include consultations with Congress. Specifically, Mittal Steel contends that, pursuant to section 129(b)(1)-(4) of the URAA, once a WTO panel or Appellate Body report has been issued, the U.S. Trade Representative (USTR) must consult Congress and the administering authority; the USTR may then ask the Department to issue a determination within 180 days that would render its action not inconsistent with the WTO report; the USTR must consult again with the Department and the relevant congressional committees; and only then can the USTR direct Commerce to implement the determination. Nucor holds this process has only recently been initiated with respect to the use of zeroing in investigations as per United States – Zeroing (2006), but the Department has not initiated any reconsideration of its zeroing methodology as it pertains to administrative reviews. Regarding United States – Zeroing (2007), which was issued on January 9, 2007, U.S. Steel and Mittal Steel contend that decision is not final since it has not yet been adopted by the WTO DSB and the statutory process for implementation of the Appellate Body's findings has not begun or even been announced yet.

In addition, U.S. Steel and Mittal Steel contend that even if a change were made to U.S. law, it would not apply to the instant review, because under U.S. law adverse WTO dispute settlement decisions are prospective only. U.S. Steel and Mittal Steel maintain that in keeping with section 129(c)(1)(B) of the URAA, WTO decisions apply only to unliquidated entries of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the administering authority is directed to implement that decision. Mittal Steel maintains that since all of the entries subject to the instant review were entered or withdrawn for consumption prior to November 1, 2005, these entries will not be affected by any changes that may be implemented as a result of the 2007 WTO Appellate Body report.

Mittal Steel also contests Corus' assertion that the Department's current methodology does not give sales at fair value their "full mathematical effect." Mittal Steel maintains the Department's current practice is to include fairly-traded imports in the denominator of the dumping margin. If the intent of the Department's dumping margin calculation is to reduce the harm to the domestic industry that is caused by unfairly-traded imports, Mittal Steel asserts, then fairly-traded imports have been given their full mathematical effect under the Department's current approach. Mittal Steel holds that calculating a dumping margin with offsets only makes mathematical sense if the purpose of the calculation is to determine the economic viability of a foreign producer's foreign exports.

Based on the foregoing, U.S. Steel, Mitttal Steel, and Nucor urge the Department to reject Corus' arguments regarding zeroing and to continue calculating dumping margins without offsetting for non-dumped sales.

Department's Position:

We agree with U.S. Steel, Mittal Steel, and Nucor and have not changed our calculation of the

weighted-average dumping margin as suggested by Corus for these final results.

Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (Emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, Commerce interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, Commerce will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to US – Softwood Lumber, consistent with section 129 of the URAA, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to United States – Zeroing (2006), Commerce recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, Commerce declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the Appellate Body's reports in US – Softwood Lumber and United States – Zeroing (2006) have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Timken, 354 F.3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an 'as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States – Zeroing 2007 at 137, 156, 165,and 185. Thus, Corus argues the Department's interpretation of the statute is inconsistent with the United State's international

obligations and, therefore, unreasonable.

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 ("{ a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is 'not inconsistent' with the panel or Appellate Body recommendations. . .)." Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department will continue with its current approach to calculating and assessing antidumping duties in this administrative review.

Finally, we note that, as a result of the implementation of the Section 129 determination, the antidumping duty order on hot-rolled steel from the Netherlands has been revoked. In anticipation of Corus questioning the propriety of assessing antidumping dumping duties on these pre-revocation entries, the Department notes that Section 129 of the URAA is clear that any implemented determination resulting from such a proceeding is effective with respect to unliquidated entries that enter or are withdrawn from the warehouse on or after the date that USTR directs the Department to implement the determination. That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated entries; however, the SAA makes clear that such entries remain subject to potential duty liability. SAA at 1026

In this instance, the Department is not altering its administrative review determination as a result of the post-POR prospective revocation of the order. The combination of clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability suggests that Congress clearly anticipated that antidumping duty liability on pre-implementation entries need not be foregone. While the Department lacks sufficient experience with such situations to establish general guidelines, in this instance, the issue is one of pure law that involves different considerations as between investigations and reviews (as reflected in the clear limitation of the Department's December 27, 2006 modification to investigations involving average-to-average comparisons) and, notwithstanding the decision to implement the report, the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded. For these reasons, the Department declines to consider giving any broader retrospective effect to the revocation of the order.

For the reasons mentioned above, we have not changed our calculation for these final results.

5. Classification of JIT Deliveries as CEP Sales

For the preliminary results, Corus states the Department classified Corus' just-in-time (JIT) sales to one unaffiliated U.S. customer as CEP transactions, based on the fact that Corus' final

invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. Corus claims the Department's decision directly contravenes the legal precedent established in the investigation and the first administrative review of this case, both of which were affirmed by the CIT. Corus Case Brief at 12, n.5 and n.6, citing Corus I, at 1253 and Corus II, at 1291, respectively. Corus argues that during the investigation, the Department found the frame agreements between Corus and its customers were confirmation of a sale or an agreement to sell. Citing Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 22146, 22149 (May 3, 2001) (Hot-Rolled Preliminary Determination), Corus holds that because its U.S. affiliate, Corus Steel USA Inc. (CSUSA), signed the frame agreements in the United States on behalf of Corus Staal BV, the Department determined the U.S. locus of the frame agreements meant the transactions were CEP transactions. In other words, Corus asserts, the Department found the frame agreements were controlling for determining whether sales were EP or CEP, and invoices were controlling for date of sale. Corus Case Brief at 13, citing Hot-Rolled Preliminary Determination at 22147-48.
Since the investigation, Corus claims all final written confirmations of the frame agreements have been executed by Corus in the Netherlands. As a result, Corus contends, in the first administrative review, the Department classified Corus' U.S. sales as EP or CEP sales based on where and by whom the frame agreements were signed. Specifically, Corus asserts the Department classified the transactions as CEP sales when the frame agreements were signed in the United States and as EP sales when the frame agreements were signed outside the United States, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 68 FR 68341, 68344 (December 8, 2003) (Hot-Rolled First Review Preliminary Results). Corus maintains the CIT upheld the Department in this determination, citing Corus II, at 1297.

According to Corus, there have been no changes in the fact pattern or to the statute since the first administrative review. Therefore, Corus argues, in the instant review the Department should also determine that where Corus Staal BV concludes the frame agreements for U.S. sales in the Netherlands and acts as the importer of record, the corresponding sales must be classified as EP transactions in accordance with the statute. Citing Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994) (Davila-Bardales) (quoting Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 37 (1st Cir. 1989), Corus contends parties subject to antidumping orders are entitled to have the law applied consistently and to make business decisions accordingly.

Corus asserts the Department misinterpreted the statute in preliminarily determining its JIT sales were misclassified as EP sales. Corus states section 772(a) of the statute defines export price as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States . . . " (emphasis added by Corus). Corus contends the Department should have considered the event that occurred first, and under the statute the first event can be an agreement to sell. However, Corus argues, in the preliminary results the Department focused solely on the final sale, as embodied in the final invoice to the customer, and in doing so, relied on the criteria used to determine date of sale. Corus maintains the Department

has acknowledged the date of sale, on which the material terms of sale are set, can differ from the date on which the terms of sale are first "agreed upon" by the parties, such as in a frame agreement. Corus Case Brief at 16, citing the Final Rule at 27348. Corus claims that by limiting its consideration of the statutory definition of EP to situations satisfying the date of sale criteria, the Department imposed an extra-statutory standard. Further, Corus maintains, by defining "agreed to be sold" in exactly the same way it defines a sale, the Department improperly negated the "agreed to be sold" provision in the statute.

Corus claims that while Congress gave the Department authority to determine "date of sale," the same cannot be said for distinguishing between EP and CEP transactions. Citing A.K. Steel Corp. v. United States, 226 F.3d 1361, 1367, 1372 (Fed. Cir. 2000) (AK Steel), Corus contends the Federal Circuit examined whether Congress intended to make a delegation to the Department regarding the definitions of EP and CEP in sections 772(a) and (b) of the statute and found that Congress had not made such a delegation. Corus asserts that "{t}he Department is not free to interpret the statute and introduce its own practice – namely, supplanting the statutory phrase 'first sold (or agreed to be sold)' with its definition of 'date of sale.'" Corus Case Brief at 17-18.

In addition, citing Ishida v. United States, 59 F.3d 1224, 1230 (Fed. Cir. 1995), Corus argues a fundamental canon of statutory construction requires that an administering body interpret a statute in a manner "that avoids rendering superfluous any provision of a statute." Thus, Corus contends, the Department should have considered the term "first" and the phrase "or agreed to be sold" in the statute. Corus claims that if the Department followed the statute, it should have determined that Corus' JIT sales were EP sales based on the frame agreements, as these clearly evidence an "agreement to sell" "before importation" "outside of the United States." At the very least, Corus asserts the Department should have recognized Corus' issuance of pro forma invoices at the time the merchandise left the Netherlands qualified as an "agreement to sell" prior to importation. As the pro forma invoices are also issued "before importation" and "outside of the United States," Corus claims the Department's classification of its JIT sales as CEP sales was contrary to law.

Corus argues the Department's preliminary results ignored the facts establishing that Corus' JIT sales meet the statutory definition for EP sales. Corus claims the record shows that Corus and its JIT customer entered into a frame agreement prior to the merchandise being imported into the United States. See Corus case brief at 18. Citing the Preliminary Results at 71523-30, Corus asserts the Department does not dispute the frame agreement is executed outside of the United States and prior to importation. Corus claims the merchandise is first agreed to be sold at the time of the frame agreement, citing Exhibit A-26 of its April 28, 2006 SQR. Corus argues it is irrelevant that the terms established in the frame agreement are subject to change, as it is the possibility of change that allows for the distinction between an agreement for sale and the final date of sale. In addition, Corus argues the pro forma invoices it issues to its U.S. JIT customer prior to export from the Netherlands are evidence of an agreement between Corus and its JIT customer to sell subject merchandise. Without such an agreement, Corus maintains it would not have manufactured and shipped such a large quantity of steel to the JIT customer.

Corus cites the Department's Preliminary Results at 71526, in which the Department found that, due to Corus' resale of merchandise originally destined for the JIT customer to another U.S. customer, Corus' JIT sales did not meet the criteria for EP sales where the first sale to an unaffiliated party occurs before importation. As a result, Corus argues, the Department determined the frame agreement could not govern the sale between the JIT customer and Corus because an order was cancelled after importation and sold to another customer in the United States. Corus Case Brief at 21, citing Preliminary Results at 71526. Corus maintains that just as the Department acknowledges there can be post-date-of-sale corrections, it should find post-agreement corrections are also possible. Corus maintains the Department should not have reclassified all of Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction.

Finally, Corus cites the Hot-Rolled First Review Preliminary Results at 68344, in which the Department referred to the Federal Circuit's finding in AK Steel that the statutory definitions of EP and CEP focused on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated. In the instant review, Corus contends the Department has ignored the location and identity of the seller as set forth in AK Steel, and instead has focused on when the material terms of sale were set. Corus argues its JIT sales are unlike those at issue in AK Steel, which the Federal Circuit found were between the U.S. affiliate and the unaffiliated U.S. customer. Corus Case Brief at 23, citing AK Steel, 226 F.3d at 1372. In contrast to the facts of AK Steel, Corus contends there is no question in the instant review that Corus Staal BV is the "seller" and the entity passing title to the unaffiliated U.S. customer, not Corus Staal's U.S. affiliate. Corus cites AK Steel, at 1370, in which the Federal Circuit stated that "{c}lassification as an EP sale requires that one of the parties to the sale be located 'outside the United States.'" Corus argues that Corus Staal BV is unquestionably a party to the JIT transactions at issue, whether measured by the frame agreements, pro forma invoices or final invoices and is also clearly located outside the United States. Citing the Preliminary Results at 71526 and its February 9, 2006 section A QR at A-12 and A-23-24, Corus argues that during the POR Corus Staal BV executed all frame agreements and there was no countersignature by the JIT customer; Corus Staal BV issued all pro forma and final invoices; and Corus' U.S. affiliate never took title to the goods.

Based on the foregoing, Corus urges the Department to classify its JIT sales as EP sales for these final results.

Mittal Steel claims the Department's determinations with respect to Corus' JIT sales have been consistent throughout the history of this order. Mittal Steel notes in the investigation, the Department found that CSUSA provided the final written confirmation to the U.S. customer establishing prices and quantities and therefore the Department concluded the merchandise was "sold (or agreed be to sold)" in the United States. In the first administrative review, Mittal Steel asserts the Department classified sales where the contracts were concluded in the United States as CEP sales.

U.S. Steel, Mittal Steel, and Nucor assert that in the second administrative review, the Department found Corus' JIT sales were clearly CEP sales, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 70 FR 18366 (April 11, 2005) (Hot-Rolled Second Review) and the accompanying Issues and Decision Memorandum at Comment 2. Mittal Steel argues the Department made this determination based on the fact that "'{t}here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise.'" Mittal Steel Rebuttal Brief at 6, quoting Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2. U.S. Steel and Nucor maintain the CIT upheld this finding. Citing Corus III, at 7-14, U.S. Steel and Nucor contend the CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions. U.S. Steel also asserts the CIT stated "'Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so.'" See Mittal Steel Rebuttal Brief at 9, n. 28, citing Corus III, at 11 n. 6. Likewise, Nucor argues the Department is always free to modify its methodologies and approaches, even within reviews of the same antidumping duty order, as long as it gives a valid explanation for doing so, citing Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1362 (CIT 2004). U.S. Steel, Mittal Steel, and Nucor contend the Department's determination in the instant review that Corus' JIT sales are properly considered CEP sales is consistent with the second administrative review.

For Corus' JIT sales, U.S. Steel asserts the sale or agreement to sell clearly took place after the goods entered the United States. U.S. Steel holds the phrase "first sold (or agreed to be sold)" as used in the statute does not refer to the first time the buyer and seller come to an agreement, but rather to the first sale to an unaffiliated customer, which could be the actual sale (i.e., the transfer of title and consideration) or the contract between buyer and seller establishing the essential terms of sale and requiring such a sale to take place. U.S. Steel Rebuttal Brief at 8-9, n. 27, citing AK Steel, 226 F.3d 1361, 1371.

Similarly, Nucor argues the CIT has found that a "sale" refers to a transfer of ownership and "an agreement to sell" refers to an agreement to transfer ownership of an item. Nucor Rebuttal Brief at 10-11, citing Corus III, 2 at 12-13. Thus, Nucor contends, "an agreement to sell" cannot occur until and unless the material terms overseeing the transfer of ownership are set. Since Corus' frame agreements do not establish the material terms of sale, and those terms are subject to change until invoicing, Nucor argues these frame agreements are best viewed as agreements to agree, and the Department may correctly conclude that no actual agreement to sell occurred until after importation. Id. at 11.

Mittal Steel also contends an agreement to certain sales terms without an agreement on price or quantity is not a sale or agreement to sell. Mittal Steel cites Corus III, at 12-13, wherein the CIT held "in order for a sale or agreement to sell to have occurred, the parties must have settled upon the price and quantity involved in the transaction with complete or at least near certainty." Mittal

Steel argues that if Corus' framework agreements were considered agreements to sell pursuant to section 772(a) of the Act, then the price must be the price established at the time of the framework agreement. Mittal Steel asserts the statute precludes any distinctions between the date of sale (i.e., the date on which price and quantity are set) and the date when merchandise is agreed to be sold. Based on Corus' reading of the statute, Mittal Steel claims, a respondent could enter into a framework agreement for several years and no matter when a sale actually took place or at what price, the price of any sale would be that set at the time of the framework agreement. Mittal Steel argues this would mean that actual pricing would be ignored and a respondent could make actual sales for less than fair value as long as it set high prices in a framework agreement. Thus, Mittal Steel asserts, the logic of the statute clarifies that the phrase "agreed to be sold" refers to an agreement which includes actual price and quantity, not Corus' framework agreements.

Nucor contests Corus' argument regarding its pro forma invoices, arguing the CIT did not consider these invoices to be agreements to sell. Nucor Rebuttal Brief at 11-12, citing Corus III. Nucor argues that because Corus' pro forma invoices do not reflect fixed material terms, they are not agreements to sell for purposes of the EP definition. Nucor asserts the cancellation of JIT sales emphasizes the fact that the pro forma invoices could not possibly reflect fixed sales terms, since the actual purchaser was not in the picture yet. Since no sale or agreement to sell was made until after importation, Nucor holds these sales are precluded from EP consideration.

Finally, Mittal Steel maintains the Department's interpretation of "export price" is in line with AK Steel. Citing AK Steel, at 1370, Mittal Steel holds the Federal Circuit found the phrase "outside the United States" in the EP definition refers to the "locus of the transaction," not the locus of the seller. Mittal Steel further cites AK Steel, at 1369, in which the Federal Circuit stated the "plain meaning of the language enacted by Congress in 1994 focuses on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated, making these two factors dispositive of the choice between the two classifications." Thus, Mittal Steel asserts, even if a sale takes place between the producer and an unrelated U.S. purchaser, it is a CEP sale if the transaction occurs in the United States. Mittal Steel argues that in the instant review, while the JIT sales may be considered a sale between the producer and an unrelated U.S. purchaser, they clearly have been made in the United States.

Accordingly, U.S. Steel, Mittal Steel and Nucor assert the Department should continue to treat Corus' JIT transactions as CEP sales for these final results.

Department's Position:

The Department had not changed its position with respect to Corus's JIT sales to one unaffiliated U.S. customer. The Department classified such sales in the preliminary results as CEP transactions, based on the fact that Corus' final invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. This is in line with Hot-Rolled Second Review, and the accompanying Issues and Decision Memorandum at Comment 2. In the Hot-Rolled Second Review the Department made

its determination based on the fact that "{t}here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise." See Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2.

The CIT upheld this finding. See Corus III, 2006 at 7-14. The CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions.

Regarding Corus's allegation that the Department changed its position on this issue, the CIT determined "Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so." See Corus III at 11 n. 6 and Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1362 (CIT 2004).

Moreover, the Department disagrees with Corus's assertion that the Department classified Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and Corus's suggestion that at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction. Rather, the cancellation of JIT sales emphasizes the fact that neither the pro forma invoices nor the framework agreements could possibly reflect fixed sales terms, since the actual purchaser can change after the importation of the goods. Since no sale or agreement to sell was made until after importation, the Department continues to hold these sales are precluded from EP consideration and were correctly classified by the Department as CEP sales.

6. Duty Absorption

Corus argues the statutory criteria for conducting a duty absorption inquiry were not met and thus the Department acted contrary to law in conducting such an inquiry. Citing section 751(a)(4) of the Act, Corus contends a duty absorption inquiry as to a foreign producer or exporter is allowed only where subject merchandise is sold through an importer affiliated with the foreign producer or exporter. Corus asserts the record shows that Corus Staal BV is both the producer/exporter and the importer of the subject merchandise. Corus claims no U.S. sales of subject merchandise were made during the POR through an importer affiliated with Corus Staal BV.

Corus cites the Preliminary Results at 71525-26, in which the Department stated it made a duty absorption determination "{b}ecause Corus Staal BV sold to unaffiliated customers in the United States through itself as the importer of record." Corus maintains the Department's justification for conducting a duty absorption inquiry directly contradicts Supreme Court precedent. According to Corus, in Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) (Barnhart), the Supreme Court examined whether an entity can be affiliated with itself and found that a "related person" is a separate entity. Corus Case Brief at 26, citing Barnhart, 534 U.S. at 456. Corus argues it is therefore not logical for the Department to find that Corus Staal BV, as the

producer/exporter, is affiliated with itself as the importer of record, nor was it logical for the CIT to uphold such a finding. Id., citing Corus III.

Corus contends the Department's justification for conducting a duty absorption inquiry is also contrary to section 771(33) of the Act, which defines "affiliated" and "affiliated persons." Corus asserts this provision is consistently written in the plural, meaning there must be two entities in order for affiliation to exist. Addressing subparagraphs (A) through (G) of section 771(33) of the Act, Corus also argues that none of the definitions therein apply to the instant case (e.g., Corus is not a member of a family, officers/directors are not implicated, etc.). Thus, based on section 771(33) of the Act, Corus contends Corus Staal BV as producer/exporter cannot be affiliated with Corus Staal BV as importer.

Corus holds the Federal Circuit has found that duty absorption inquiries can only be made in accordance with the statute, citing FAG Italia S.p.A. v. United States, 291 F.3d 806, 818 (Fed. Cir. 2002). Corus claims that Congress has defined duty absorption inquiries as appropriate solely in situations in which U.S. sales are made through an importer affiliated with a foreign exporter or producer.

Corus argues the Department's duty absorption analysis basically provides that if a respondent is dumping, the respondent also is presumed to be absorbing duties and the burden falls on the respondent to show otherwise. Citing Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 65 FR 13943 (March 15, 2000) (Gray Portland Cement) and the accompanying Issues and Decision Memorandum at Comment 26, Corus maintains that to rebut this presumption, a respondent must demonstrate there is an irrevocable agreement between the affiliated importer or producer and the unaffiliated purchaser showing the unaffiliated purchaser will pay the antidumping duties. Corus claims the CIT has previously found this requirement to be commercially unreasonable and likely unenforceable, citing Fabrique de Fer de Charleroi S.A. v. United States, 25 CIT 741, 155 F. Supp. 2d 801 (2001) (Fabrique de Fer de Charleroi). Corus argues the Department has found the customer's written promise to pay antidumping duties to be the most persuasive evidence of the passing on of costs, citing Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694, 69704 (December 14, 1999).

Although a respondent has the opportunity to rebut the presumption that duties are being absorbed, Corus claims the Department has yet to accept the evidence presented by any respondent as satisfactory, citing, among others, Stainless Steel Wire Rod From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 57879 (October 7, 2003) and Gray Portland Cement. Thus, Corus contends, even if the Department's presumption is rebuttable in the abstract, the fact that the Department has shown the presumption to be de facto irrebuttable for 10 years renders that presumption unlawful.

In addition, Corus argues, the Department has yet to establish any quantitative criteria for conducting duty absorption inquiries. Citing the Final Rule at 27318, Corus asserts that in 1997

the Department noted it would proceed on an ad hoc basis with respect to duty absorption inquiries. Corus claims that up until the present time, the Department has relied merely on whether sales have been made at less than NV as evidence of duty absorption.

Corus argues the statute clearly mandates the Department to do more than simply presume duty absorption is occurring in situations in which there is a dumping margin. According to Corus, the Department's duty absorption standard is unlawful because it does not consistently apply the word "determine" as utilized in sections 751(a)(1) and 751(a)(4) of the Act. Quoting these two provisions, Corus contends the Congress granted the Department authority to determine the amount of antidumping duties due and to determine whether antidumping duties have been absorbed. Citing Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (Sullivan v. Stroop), Corus argues a pillar of statutory construction is that the same words or phrases in the statute should be given the same meaning. Thus, Corus holds, the word "determine" cannot be interpreted to require a detailed analysis for one provision and an automatic presumption for the other.

Corus asserts the WTO Appellate Body also has analyzed the word "determine" in Article 11.3 of the WTO Antidumping Agreement with respect to the Department's sunset reviews. Citing Corrosion-Resistant at ¶¶ 114-15 and 178, Corus contends the Appellate Body found the word "determine" required the Department to conduct a more rigorous investigation in sunset reviews and precluded the Department from merely presuming that a likelihood of continued or resumed dumping exists.

Finally, Corus maintains there is no evidence on the record showing that Corus absorbed or did not pass on duties. Rather, Corus argues, the record shows it negotiated terms and prices with its U.S. customers with the intention of passing on dumping duties to those customers. In making this statement, Corus refers to the agreement in its February 9, 2006, submission (duty absorption response) at Exhibit A which, Corus claims, contains "a standard provision protecting Corus should its U.S. price provision decline over time." Corus Case Brief at 33.

U.S. Steel, Mittal Steel, and Nucor respond that the Department properly conducted a duty absorption inquiry and found that Corus was absorbing duties. Mittal Steel and Nucor state the Department conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding, citing Corus III, at 14-17. U.S. Steel and Nucor argue the CIT specifically has found it proper for the Department to conduct a duty absorption inquiry as to a foreign producer or exporter that also acted as importer of record, citing Agro Dutch Indus., Ltd. v. United States, CIT Slip Op. 06-40 (Mar. 28, 2006).

U.S. Steel, Mittal Steel, and Nucor disagree with Corus' assertion that the Department has established an irrebuttable presumption that duty absorption is occurring where there is dumping. U.S. Steel argues that in Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005), the respondent provided evidence rebutting the presumption of duty absorption and the Department made a finding of no duty absorption. Both U.S. Steel and Mittal Steel contend it is appropriate for the Department to shift the burden onto the respondent to show that antidumping duties will

be paid fully by the unaffiliated purchaser, because the respondent is the only party to the proceeding able to provide such evidence. Since Corus is the party possessing the information relevant to duty absorption and has not provided any such information, Mittal Steel holds the Department has presumed reasonably that Corus is absorbing duties. Nucor asserts the Department preliminarily found that Corus sold subject merchandise at dumped prices during the POR and under the Department's long-standing practice it is Corus' responsibility to provide sufficient evidence to rebut the presumption of duty absorption. Nucor argues Corus has not done so and thus the Department has substantial record evidence to find that duty absorption did occur during the POR. Rather than outlining its efforts to devise an enforceable agreement with its customers regarding antidumping liabilities or showing it is commercially unable to enter into such an agreement, Nucor argues, Corus concedes its "contract 'provisions do not allow for the retroactive collection of any additional antidumping duties ultimately assessed on the subject merchandise.'" Nucor Rebuttal Brief at 16-17, citing Corus' February 9, 2006, QR at 9.

U.S. Steel and Nucor contend the Department's initial presumption of duty absorption is reasonable because the continued existence of dumping shows the producer and its affiliate have not adjusted their prices to curb dumping. In support of this assertion, Nucor cites Gray Portland Cement and the accompanying Issues and Decision Memorandum at Comment 26. Nucor claims the Department's decision in the instant review is consistent with its long-standing practice. Nucor holds that as early as 1997, the Department stated the existence of a dumping margin raises the initial presumption the respondent and its affiliated importer are absorbing duties, citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54046 (October 17, 1997). Nucor claims nothing about the Department's duty absorption inquiries is ad hoc, stating that if there is a dumping margin the respondent must produce an enforceable agreement between itself and the first unaffiliated purchaser in which the latter agrees to pay all dumping duties associated with the sale. U.S. Steel claims the Department appropriately conducts duty absorption inquiries on a case-by-case basis, arguing that in Fabrique de Fer de Charleroi, the CIT found the Department has discretion under the statute to consider the relevant evidence and make duty absorption findings on a case-by-case basis.

U.S. Steel and Mittal Steel refer to Corus' statement in its case brief that the terms and conditions of its U.S. sales contain "a standard provision protecting Corus should its U.S. price provision decline over time." U.S. Steel claims this standard provision cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties and as such, the record contains no evidence that duties were not absorbed. Mittal Steel contends that it summarized in its February 28, 2006, letter the reasons why the Department should not rely upon this "standard provision" as proof that antidumping duties were not absorbed.

Finally, both Mittal Steel and Nucor respond to Corus' argument regarding the use of the word "determine" in the statute. Mittal Steel argues the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations, and as part of the instant review it sought information pertinent to both issues. To the extent the Department received information regarding either issue, Mittal Steel claims the Department

relied upon that information in making its dumping and duty absorption determinations. Quoting Webster's New College Dictionary (3d ed. 2005) at 315, Nucor asserts the word "determine" means "to decide or settle … authoritatively and conclusively." Nucor contends this definition, and by extension the statute, does not require that the question of duty absorption be resolved by either a massive investigation or a rebuttable presumption. Instead, Nucor maintains, Congress only intended for the Department to decide or settle, authoritatively and conclusively, whether duties were absorbed. Arguing that Corus' cite to Sullivan v. Stroop for the canon of statutory construction is inapposite, Nucor asserts that "determine" is a single word with a vague and broad definition and there are no cross-references for "determine" in the statute that direct the Department to make a "determination" using a certain approach. With respect to Corus' reference to the WTO Appellate Body's analysis of the word "determine," Nucor contends the Appellate Body's opinion is not binding on the Department, has no formal application in U.S. law, and did not even relate to duty absorption inquiries. While the WTO Appellate Body found that a "determination" in a sunset review cannot be based on presumptions or assumptions, Nucor holds, there is nothing in the word's definition that prevents such a finding.

Department's Position:

The Department notes that it conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding. See Corus III. With respect to Corus's claim that Corus Staal is both the producer and exporter and cannot be affiliated with itself as the importer, the Department noted in the preliminary results that the CIT addressed this issue when it decided "Commerce's interpretation of 'affiliated' to include exporters importing through themselves has been found to be a permissible construction of the statute." See Corus Staal BV v. United States, 2006 Ct. Intl. Trade LEXIS 113 (CIT 2006) at note 10. That decision quoted approvingly Agro Dutch Indus. v. United States, 2006 Ct. Intl. Trade LEXIS 41 (CIT 2006):

> Commerce's interpretation of subsection 1675(a)(4) appears to be a reasonable, common-sense solution to what Congress attempted to accomplish with its enactment. This conclusion is inherent from the statute's focus-- upon duty absorption in the foreign producer or exporter-- and therefore even if the meaning of "affiliate" were clear, and resort to legislative history unnecessary, to find that the statute does not address the circumstance of the foreign producer or exporter itself acting as the importer of record would result in an apparent absurdity.

With respect to the argument that Corus's standard provision protecting Corus "should its U.S. price provision decline over time," the Department disagrees and finds this agreement cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties. Therefore, the Department finds the record contains no evidence that duties were not absorbed. Because Corus Staal did not rebut the duty absorption presumption with evidence that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise, we have not changed our preliminarily finding that antidumping duties have been absorbed by Corus Staal on all U.S. sales made through its importer of record, namely Corus Staal.

Finally, with respect to Corus' definition of the word "determine," the Department agrees with Mittal Steel's argument that the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations. The Department sought information pertinent to both issues, and gave Corus opportunity to rebut the presumption of duty absorption. Corus failed to provide such evidence.

Warranty Expenses

Corus argues the Department erred in the preliminary results by replacing its reported customer-specific warranty expense rates with overall average warranty expense rates for subject hot-rolled steel merchandise in each market. Corus contends the Department provided no explanation for this determination in the preliminary results and seems to have assumed that the overall average warranty expense rates would result in a more accurate margin calculation.

Corus cites the Department's January 3, 2006, questionnaire at pages B-26 and C-30, which asks the respondent to report warranty costs on a model-specific basis, and if this is not practical, to express warranty costs on the most product specific basis possible. Corus contends it does not manufacture or sell hot-rolled steel on a product-specific basis and thus it cannot record warranty expenses on that basis. Citing its February 9, 2006, questionnaire response at A-75-76, Corus asserts it produces hot-rolled steel to customer specifications. As each customer's needs remain relatively constant over time, Corus maintains that customers tend to make repeated purchases of the same or similar specifications. Corus states it therefore computed and reported its home market and U.S. warranty expenses on a customer-specific basis by summing all of the credit notes issued to each U.S. or home market customer during the POR and dividing those totals by the quantity shipped to each customer. Corus asserts that since it manufactures subject hot-rolled steel to order according to customer specifications, its reported customer-specific rates are in fact model-specific. By using overall average warranty expense rates, Corus asserts the Department disregarded the most product-specific basis for calculating warranty expenses.

Corus claims the Department's decision not to use its reported customer-specific warranty expenses conflicts with case precedent, citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea, 67 FR 62124 (October 3, 2002) (Cold-Rolled Steel from Korea) and the accompanying Issues and Decision Memorandum at Comment 11 and Grain-Oriented Electrical Steel from Italy: Final Results of Antidumping Administrative Review, 66 FR 14887 (March 14, 2001) (GOES from Italy) and the accompanying Issues and Decision Memorandum at Comment 6. In GOES from Italy, Corus argues, the Department stated, "where the respondent does not record warranty expenses on a model-specific basis in the normal course of business, the Department allows these expenses to be reported on a customer-specific basis." Corus Case Brief at 37, citing GOES from Italy and the accompanying Issues and Decision Memorandum at Comment 6.

Corus contends the Department has accepted Corus' customer-specific methodology for reporting warranty expenses in the original investigation and each subsequent administrative review. Corus argues the Department accepted its customer-specific warranty expense reporting in both the investigation and the first administrative review following verifications in which it found "no discrepancies" with respect to Corus' U.S. and home market warranty expenses. Corus asserts there have not been any material changes in fact in the instant review that would warrant a change in how its warranty expenses are treated. Without a change in material fact, Corus argues the law dictates that an agency cannot resolve an issue in a contrary manner, citing, among others, Davila-Bardales, 27 F.3d at 5 (quoting Shaw's Supermarkets, 884 F.2d at 36); Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 418 (Ct. Int'l Trade 1993); and Anshan Iron & Steel Co. Ltd. v. United States, 2003 Ct. Int'l Trade Lexis 109, Slip Op. 2003-83 (2003) at *19-20 (citing Shikoku Chems. Corp. v. United States, 795 F. Supp. 417, 421-22 (Ct. Int'l Trade 1992) (Shikoku)).

In addition, Corus states it has used a customer-specific methodology for both the U.S. and home markets. Citing Cold-Rolled Steel from Korea and the accompanying Issues and Decision Memorandum at Comment 11, Corus holds the Department has found that consistency between markets lends support to accepting customer-specific warranty expenses, although such consistency is not the deciding factor.

In conclusion, Corus maintains it relied upon the Department's acceptance of its customer-specific warranty expenses in all prior segments of this proceeding and the Department has given no explanation for its change in methodology nor has it shown that its explanation is in keeping with law or supported by record evidence. Thus, Corus urges the Department to use its reported customer-specific warranty expense rates for these final results.

U.S. Steel contends Corus has failed to show that its customer-specific warranty expenses are model-specific. In fact, U.S. Steel asserts, Corus' claim that its customer-specific warranty expenses are akin to model-specific rates is contradicted by its own sales data. U.S. Steel maintains the Department's use of average warranty rates in the U.S. and home markets is supported by record evidence and is in accordance with the Department's standard practice. Citing Corus' April 28, 2006, SQR at 55 and 71, U.S. Steel argues that Corus offered the same warranty terms to all home market customers and that warranty terms did not vary from customer to customer in the U.S. market. Where warranty terms do not differ significantly from customer to customer, U.S. Steel claims the Department's practice is to allocate total warranty expenses over total sales in each market. U.S. Steel Rebuttal Brief at 15, citing Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 71 FR 26333 (May 4, 2006) (Honey from Argentina) and the accompanying Issues and Decision Memorandum at Comment 1.

Mittal Steel argues the Department has a considerable amount of discretion when determining how to allocate warranty expenses, citing NSK, Ltd. v. Koyo Seiko Co., Ltd., 190 F.3d 1321, 1331 (Fed. Cir. 1999). Pursuant to section 351.401(g)(1) of the Department's regulations, Mittal Steel contends the Department may use allocated expenses when transaction-specific reporting is

not feasible and the Department is satisfied that the allocation method does not cause inaccuracies or distortions. Since warranty expenses typically cannot be reported on a transaction-specific basis, Mittal Steel claims it is necessary to use some method of allocation to account for these expenses. Mittal Steel maintains the Department has opted to apply an average warranty rate to all sales rather than rely on customer-specific warranty expenses, citing Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611 (October 4, 2001) (Honey from Argentina Final Determination) and the accompanying Issues and Decision Memorandum at Comment 15. Mittal Steel contends the Department made that determination in Honey from Argentina Final Determination because it found there were no significant differences between product lines and warranty terms between customers. Mittal Steel Rebuttal Brief at 14-15, citing Honey from Argentina and the accompanying Issues and Decision Memorandum at Comment 1. Citing Corus' April 28, 2006, SQR at 55 and 71, Mittal Steel argues that Corus offers the same warranty terms to all customers in each market and therefore application of an average warranty expense rate to all sales in each market is appropriate.

Mittal Steel asserts that Corus' citations to Cold-Rolled Steel from Korea and GOES from Italy are inapposite. In those cases, Mittal Steel argues, the Department rejected challenges to its decision to use customer-specific warranty expenses since transaction-specific reporting was not feasible and no other alternative for measuring the expenses was presented. However, Mittal Steel claims, in the instant review there is an alternative method for allocating warranty expenses since Corus has provided an overall average warranty expense rate for both markets. Mittal Steel argues the Department has acted within its discretion to use the overall average warranty expense rates because these are less likely to result in inaccuracies and distortions.

Nucor argues that the Department asked Corus to report warranty expenses on a model-specific basis both in the original questionnaire and in a supplemental questionnaire. However, Nucor asserts, Corus did not report model-specific warranty expenses and did not explain why it was unable to do so. Nucor maintains Corus has not provided any general ledgers that would support Corus' claim that warranty expenses are not recorded on a product level more specific than hot-rolled steel. Nucor contends that even if Corus' ledgers are not kept at this level, there is a mill certificate for each hot-rolled coil as is typical in the steel industry. Thus, Nucor claims, it is likely a warranty claim on a particular sale of subject merchandise could be traced back to the manufacturer and from there Corus could have allocated POR warranty expenses on a product-specific basis. Because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department, Nucor argues the Department is warranted in using adverse facts available.

Given the alternative of using a customer-specific methodology or an average rate, Nucor claims an average warranty expense rate is more appropriate in this case. Although the Department has accepted customer-specific warranty expenses in certain cases, such as in Cold-Rolled Steel from Korea and GOES from Italy, Nucor argues the Department has chosen to employ average rates over customer-specific rates in certain circumstances, such as in Honey from Argentina. Nucor contends an identical fact pattern exists in the instant review. Citing Corus' April 28, 2006, SQR

at 55 and 71, Nucor argues that Corus offers the same warranty terms to all customers in each market. Moreover, Nucor claims, Corus was unable to provide copies of warranty agreements for each customer.

U.S. Steel, Mittal Steel, and Nucor maintain the Department's use of a different methodology from that used in prior segments of this proceeding is not without precedent. U.S. Steel and Nucor cite Honey from Argentina, in which the Department employed a market-wide warranty expense allocation despite accepting the respondent's customer-specific warranty expenses in previous administrative reviews. Mittal Steel holds the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts upholding a different conclusion, citing Hoogovens Staal BV v. United States, 4 F.Supp.2d 1213, 1217 (CIT 1998). Referring to Shikoku, Mittal Steel asserts that while the Court found the Department lacked an adequate basis for changing its practice in Shikuko, Corus offers no support for its claim that it relied on the Department's prior methodology to its detriment. Mittal Steel contends the Department found Shikoku to be inapplicable for this same reason in Honey from Argentina Third Administrative Review. Mittal Rebuttal Brief at 16-17, citing Honey from Argentina.

Based on the foregoing, U.S. Steel, Mittal Steel and Nucor assert the Department properly used overall average warranty rates in the preliminary results and should continue to do so for the final results.

Department's Position*:*

The Department has determined that it correctly used the overall average warranty rates in the preliminary results and has not changed its position in these final results. In its questionnaires, the Department asked Corus to provide documentation showing how warranty terms differed by customer. In its reply, Corus stated it provided the same warranty terms to all home market customers and that warranty terms do not vary from customer to customer in the U.S. market. See Corus's April 28, 2006, supplemental response at 55 and 71. Therefore, as no significant differences exist between product lines and warranty terms between customers in the market at issue in this review are not distinguishable, the Department finds a market allocation methodology superior under these circumstances. See Honey from Argentina.

Moreover, with respect to the claim that the Department cannot change methodologies from proceeding to proceeding, the Department agrees with Mittal Steel that the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts supporting a different conclusion. See Hoogovens Staal BV v. United States, 4 F.Supp.2d 1213, 1217 (Ct. Int'l Trade 1998).

The Department is authorized to exercise its discretion in the treatment of warranty expenses, provided the interpretation of the statute is reasonable. NSK Ltd. v. United States, 190 F.3d 1321, 1331 (Fed. Cir. 1999) (citing Zenith Elecs Corp. v. United States, 988 F.2d 1573, 1583-84 (Fed. Cir. 1993)). Accordingly, the Department may formulate and apply improved methodologies based on the facts of a review. See Honey from Argentina.

As stated in Honey from Argentina, the Department recognizes that by their nature warranty expenses are unknown and unforeseeable at the time of sale. As such, in evaluating these types of expenses (i.e., expenses that are inherently unpredictable at the time of sale), the Department tries to account for warranty expenses on a model-specific basis. If Corus had been able to show different warranty terms to different customers, a customer-specific warranty rate may have been acceptable. However, in this case, Corus was unable to show either a basis for either a model-specific warranty or a customer-specific warranty. Therefore, the Department, in line with similar recent cases, is justified in using a market-specific allocation as reported by Corus in its April 28, 2006, response at 55 and 71.

The Department disagrees with Nucor that the Department would be warranted in using adverse facts available because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department. Corus has claimed it does not sell different models or types of subject hot-rolled merchandise, and there is nothing on the record of this proceeding that allows the Department to conclude otherwise. Therefore, we find that an adverse application of facts available is not warranted in this specific situation.

8. Clerical Errors

First, Mittal Steel alleges the Department's margin calculation program contains a clerical error that results in the incorrect matching of U.S. sales to normal values. Specifically, Mittal Steel claims the program erroneously compares U.S. control numbers (CONNUMU) to comparison market product codes (PRODCODH) in trying to find identical matches. Mittal Steel argues the Department can fix this error by including the variable comparison market control number (CONNUMH) in the weighted average normal value (NV) database output for the comparison market program and adjusting the margin program to use the CONNUMH rather than PRODCODH.

Corus does not rebut Mittal Steel's argument.

Second, Corus argues in calculating the CEP profit rate, the Department inadvertently neglected to include U.S. indirect selling expenses (ISEs) for EP transactions. Specifically, Corus contends the Department did not incorporate the field INDIRS1U, which includes the ISEs that Corus incurred in the United States, in the CEP profit rate calculation. Corus asserts this mistake artificially increased Corus' CEP profit in the preliminary results, and thus urges the Department to correct this error for the final results.

U.S. Steel, Mittal Steel, and Nucor did not comment on the clerical error.

Department's Position:
We agree that both comments are clerical errors and have corrected both. However, with respect to the first error, we have used use PRODCODH/U as Corus used these fields to report the

product characteristics contained in the Department's questionnaire. With respect to the second error, the programming language suggested by Corus would result in the DINDIRSU being multiplied by INDIRS1U. This would not achieve the desired correction. Instead, the Department has crafted programming language to effect the desired change. See our Final Results calculation memorandum, dated May 15, 2007, for the revised programming.

Agree _____ Disagree _____

_____
David M. Spooner
Assistant Secretary
For Import Administration

_____
Date